No. 89-1275 (2)

In The

Supreme Court of the United States

October Term, 1989

ROSELLA O'GRADY and FRANK O'GRADY,

Petitioners,

vs.

ROBERT I. OBERHAND, M.D., JOSEPH DiLALLO, M.D., PAUL R. FRANZ, D.C., PHYLLIS LaFLAMME, R.N., MARY C. MAJOR and MARY ANN HAMBURGER,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENT JOSEPH DiLALLO, M.D.

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COUNTER-STATEMENT OF THE CASE

The first time that respondent Joseph DiLallo, M.D. saw petitioner Rosella O'Grady as a patient was August 24, 1982

(25T106: 21-23). Previously, she had been seen by his office associate, Dr. Mary Herald on November 20, 1975. Mrs. O'Grady presented on several occasions with sinus-type headaches running over the front of her head (25T107: 11-17). Dr. Herald's impression was sinusitis (25T109: 35).

On August 20, 1977 Mrs. O'Grady again appeared at Dr. DiLallo's office complaining of headaches and head congestion (25T110: 1-2). On January 9, 1981 Mrs. O'Grady called Dr. DiLallo's office once again indicating that she was suffering from headaches. On this occasion she indicated that she had headaches for three days with eye pain (25T111: 1-2). Therefore, between 1975 and 1982, Dr. DiLallo was aware from Mrs. O'Grady's history that this was a woman plagued with periodic sinus-type headaches. This history necessarily plays an important part in assessing the overall condition in March of 1983.

Dr. Paul Franz, the petitioner's chiropractor, also substantiated the petitioner's headache history. On October 22, 1982, Mrs. O'Grady filled out a confidential medical history at which time she checked Dr. Franz' form indicating that she suffered from headaches frequently. Furthermore, she advised him that she had them for twenty years, experiencing them two to three times a week and lasting two to three hours. She experienced them ". . .behind the eyeballs, radiating to the back of her head." They were sometimes associated with nausea (24T57: 25; 24T58: 10).

When Dr. Oberhand saw Mrs. O'Grady on March 7, 1983 her complaints were as follows: severe cervical sprain, pain in the forehead, pains in the back of the neck and over the top of the head, pain behind the eyes, pressure in the face, congestion, post-nasal discharge, ear blockage and hearing loss, all present for five days (25T37: 15-21). Counting back five days, the onset of the complaint coincided with a neck injury which petitioner

sustained while exercising on March 2, 1983.

Mrs. O'Grady testified that as a result of this neck injury she went to see a chiropractor, Dr. Franz, on March 2 (23T30: 11-15). Dr. Franz examined Mrs. O'Grady on March 2, and found that there were subluxation compressions present from the cervical spine which would account for her neck pain (24T74: 10-22). Furthermore, x-rays revealed a degenerative joint disease of her cervical spine (24T76: 15-25; 24T77: 1).

In his evaluation of Mrs. O'Grady's headache, Dr. Oberhand explained that he evaluates how comfortable or in obvious distress the patient is, whether the patient is distracted in any way, and he evaluates the patient's posture and demeanor, for abnormalities (25T39: 1-7). On this particular day Mrs. O'Grady had driven herself to the office, she was unattended, comfortable, and not in any abnormal distress. It was Dr. Oberhand's conclusions following his physical examination that she was suffering from another sinus infection (25T40: 6-7). His course of treatment at that time was to prescribe an antibiotic (25T40: 15-16); to inject cortisone into the nose (25T40: 20-21), and to advise her to return in one week.

Additionally, he discussed the possibility of a sub-mucous resection (25T41: 1-7). Mrs. O'Grady did not ask for any medication for pain at that time (25T41: 20-23).

Following the office visit of March 7, 1983, Mrs. O'Grady called Dr. Oberhand's office on two occasions between March 7 and March 14, regarding insurance information. There were no complaints with respect to headaches during either of the two telephone conversations with Dr. Oberhand's office (25T45: 16-18; 25T46: 18-21).

Her next visit with Dr. Oberhand was March 14, 1983. Her

complaints at that time were cervical spinal pain radiating to the forehead, chronic eye pain and ear aches. She also reported for the first time that she was seeing a chiropractor for her pain (25T47: 8-11).

In addition to her complaints of headaches, she also had nasal complaints and neck complaints, but at that time, the neck pains were more severe than the sinus pains (25T51:10-13).

Dr. Oberhand again evaluated Mrs. O'Grady's complaints of headaches by evaluating her appearance and by performing a physical examination during the office visit.

Mrs. O'Grady appeared comfortable. She had driven herself to the office, and showed no distress or discomfort throughout the examination (25T48: 11-25). Dr. Oberhand properly advised Mrs. O'Grady that the neck complaints were probably not related to his specialty, but it was his feeling that it was related to the muscles of the neck and could be an arthritic problem (25T51: 8-22). Accordingly, he advised her to consult her family physician, Dr. DiLallo, for evaluation of the neck pain, he ordered sinus x-rays and advised her to return in two months to have her hearing rechecked (25T52: 15-25; 25T53: 1).

At that time, Dr. Oberhand also sent a letter to Dr. DiLallo with a copy to the petitioner dated March 14, 1983. *See* DOa 113-114. In that letter Dr. Oberhand advised Dr. DiLallo that Mrs. O'Grady was complaining of severe, disabling headaches. He indicated that he was referring Mrs. O'Grady back to Dr. DiLallo, "for treatment of cervical arthritis and medication or possibly with orthopaedic consult for further evaluation." He further stated that her pain was related to an otolaryngologic problem. Mrs. O'Grady acknowledged receiving a copy of Dr. Oberhand's letter, but did not follow up with Dr. DiLallo because at that time the headaches had gone away (23T41: 13; 23T42: 5).

Dr. Oberhand explained that he did not call Dr. DiLallo on the telephone because there was absolutely nothing urgent or emergent in the appearance of Mrs. O'Grady in his examination. She appeared to be perfectly comfortable (25T57: 17-20). He further explained that if the situation was in any way urgent, he would have sent her to the emergency room after calling her family physician (25T58: 3-10).

With respect to the letter of March 14, 1983 written by Dr. Oberhand, Dr. DiLallo did not see that letter until after Mrs. O'Grady had her hemorrhage on March 31, 1983 (25T112: 5-9). The letter was apparently filed by an office employee before Dr. DiLallo had an opportunity to review it. Assuming that he had seen the letter, Dr. DiLallo testified that he did not see any urgency in the letter which would have caused him to call Mrs. O'Grady upon receiving it (25T113: 3-12). Despite the fact that there was nothing urgent contained within the letter, he might possibly have called her anyway because he would have been interested in knowing what was happening with her (25T113: 13-19).

Following Mrs. O'Grady's second visit with Dr. Oberhand on March 14, 1983, she again saw her chiropractor, Dr. Franz on March 16, 1983. At that time he found a subluxation of the cervical spine and treated her with chiropractic manipulations (24T81: 13-16). During her next visit to Dr. Franz on March 21, 1983, Mrs. O'Grady told him that her headaches were gone. (24T81: 22-25). Therefore, assuming further that Dr. DiLallo had called Mrs. O'Grady on either March 17 or March 18 following his receipt of Dr. Oberhand's letter, the patient would have advised him that she had no complaints of headache at that time. Dr. DiLallo testified that under the circumstances that he would have indicated to her that if she has any further problems, that she should let him know (25T114: 13-23).

At trial each defense expert testified with literally no

contradiction that there was nothing urgent or emergent in the substance of the letter of March 14, 1983, and that had a call been made to the patient, there was no requirement under the circumstances to follow up with that patient if she no longer complained of headaches (25T186: 7-20; 26T40: 1-10). In fact, petitioner's own expert, Dr. Roger Rose, an otolaryngologist, agreed that the letter which was sent to Dr. DiLallo "does not convey any sense of urgency." (20T169: 13-16). He also agreed that the letter indicates that the patient is being referred specifically for cervical arthritis, or perhaps an orthopaedic problem and there is no sense of urgency or emergency in these conditions (20T170: 6-12). Ultimately, it was his opinion that urgent problems are not handled by the mail (20T176: 1-4). He furthermore conceded that people who complain of pain radiating from the back to the front of the neck and from the front to the back, are in the overwhelming number of cases *not* connected with subarachnoid hemorrhage (20T178: 5-12).

The expert testimony offered at trial established on March 31, 1983 that Rosella O'Grady suffered a spontaneous subarachnoid and intracerebral hemorrhage from a congenital aneurysm of the middle cerebral artery. This was the opinion of Dr. Howard Medinets, a neurosurgeon who was called as an expert witness on behalf of Dr. Oberhand and Dr. DiLallo (25T152: 23; 25T153: 1). Additionally, it was his opinion that even if a CAT scan had been taken between March 7, 1983 and March 14, 1983, it would have been perfectly normal (25T158: 23-25; 25T159: 1). He based the fact that the subarachnoid hemorrhage occurred spontaneously on March 31, 1983, based on the *location* of the aneurysm. Specifically, he testified that a rupture from the middle cerebral artery is a catastrophe, like an explosion inside the head (25T167: 11-12). Damage also occurs because the blood vessels in the brain go into a spasm in an attempt to control the bleeding and decrease the amount of blood flow (25T167: 20-23). Thus, Dr. Medinets drew the conclusion that Mrs. O'Grady could

not possibly have been suffering from a leak at the time that she saw Dr. Oberhand without suffering severe neurologic symptoms (25T180: 3-5). In all of his experiences, Dr. Medinets had never seen someone who could walk with a hemorrhage such as the one suffered by Mrs. O'Grady (25T180: 18-20).

Furthermore, he found it significant that Mrs. O'Grady's neck had been found to be supple during Dr. Oberhand's examination of March 7, 1983. He explained that one of the signs of subarachnoid hemorrhage is a rigid or stiff neck. This was not the case upon examination of Mrs. O'Grady (25T173: 5-6). Thus, he agreed with Dr. Oberhand's diagnosis that prior to March 31, Mrs. O'Grady was suffering from cervical arthritis as confirmed by his review of the cervical x-rays taken by her treating chiropractor, Dr. Franz (25T182: 1-15). Dr. Medinets concluded that even if a CAT scan had been taken prior to March 31, 1983, it would have failed to show any aneurysm. He testified that the aneurysm would have been too small to have been detected on a CAT scan (25T158: 13; 25T159: 8). In fact, the CAT scan taken on March 31, 1983 following the plaintiff's rupture, failed to show the aneurysm (25T154: 25; 25T155: 4). The aneurysm was only later confirmed by an arteriogram done on July 18, 1983 (25T166: 11-17). Even Mrs. O'Grady's own expert, Dr. Derby, admitted that plaintiff was a Class I patient *without* neurological signs up to the time that the aneurysm ruptured on March 31 (19T252: 15; 19T253: 2).

Kenneth Jacobson, M.D., a board certified internist with a subspecialty in cardiovascular disease, also testified on behalf of Dr. DiLallo. From his review of the medical records in this case, it was Dr. Jacobson's opinion that Mrs. O'Grady had a long history of headache problems and that, this was certainly a factor that a physician can consider in evaluating the patient (26T81: 22-25; 26T82: 1-4). He essentially agreed with Dr. Medinets that with a middle cerebral artery bleed, that one would expect to find

some neurological signs in the patient (26T85: 4-10). Following his review of the materials, it was his opinion that within a reasonable degree of medical probability, that the basis of Mrs. O'Grady's complaints of headaches prior to March 31, 1983 was either cervical arthritis or a sinus headache (26T90: 1-6).

With respect to the actions of Dr. DiLallo in this case, it was Dr. Jacobson's opinion that there was no obligation to do any follow up after receiving the letter of March 14, 1983 from Dr. Oberhand because it was not an urgent or compelling letter (26T58: 3-19). Further, assuming that Dr. DiLallo had called the patient and she did not have any complaints of headaches, it would have been Dr. DiLallo's obligation only to advise her that if her headache problems should come back, that she should call him (26T40:1-10). There would surely not have been any obligation on the part of Dr. DiLallo to inquire into the details surrounding the headaches which are referred to in the letter of March 14, 1983 (26T40: 11-16).

Plaintiff's expert, Dr. Bennett Derby, testified that with respect to Dr. DiLallo's conduct, he should have immediately contacted the plaintiff to verify for himself if the complaints were severe and disabling. He should then have referred the plaintiff to a neurologist or neurosurgeon (19T197: 6-13). However, there was no question that in his mind that if Dr. DiLallo had received the letter and made the phone call to Mrs. O'Grady on March 16 or March 17, and asked her how her headaches were, she would have responded that her headaches were gone and she was being treated with a chiropractor (19T259: 1-10). Similar testimony was offered by Charles Duncan, M.D., a neurosurgeon who testified on Mrs. O'Grady's behalf (20T63:11-17).

The trial in this matter concluded on March 26, 1987. Following the court's charge to the jury there was no objection made by plaintiffs, nor was a request made for a "loss of chance"

charge as enunciated by the New Jersey Supreme Court in *Evers v. Dollinger*, 95 N.J. 399 (1984) (26T221: 12-16). During the course of the jury's deliberation, the jury requested that a portion of the deposition transcript of Dr. Oberhand be read back. After discussion with counsel, a passage was selected to be read to the jury. It should be noted that at no time did plaintiff's counsel ever object to the portion of Dr. Oberhand's deposition testimony that was read back to the jury in response to their question (26T243-248). In fact on the following morning, March 27, 1987, the jury requested that the passage be read to them once again in order to refresh their recollection. Mrs. O'Grady's counsel again voiced no objection to the passage which was read back to the jury (27T: 3-4).

On March 27, 1987 the jury returned a verdict that Dr. Oberhand and Dr. DiLallo were not professionally negligent. Since the jury concluded that neither defendant was negligent, they did not render a verdict on the issue of proximate cause.

On April 24, 1987 the plaintiffs moved for a new trial on the ground that the verdict was against the weight of the evidence. Plaintiff's motion was denied. On April 20, 1989 the Superior Court of New Jersey, Appellate Division, affirmed the judgment below. Plaintiff's petition for certification to the Supreme Court of New Jersey was denied on September 6, 1989.

At no time was a federal question ever adequately raised, preserved or passed upon in the state court below.

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI WHERE THE PETITIONER HAS FAILED TO PROPERLY OR ADEQUATELY RAISE A CLAIM UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THE NEW JERSEY COURTS.

The petitioners invoke the jurisdiction of this court pursuant to 28 U.S.C. § 1257(a). That statute, as applied to the circumstances of this case,requires that in the state courts that the petitioners have "specially set up or claimed under the Constitution or the treaties or statutes or any commission held or authority exercised under the United States," that right which they now seek to have this court enforce.

In this regard, Rule 21.1(h) of the Rules of the Supreme Court specifically require the petitioner to specify in his or her statement of the case:

> The stage in the proceedings, both in the court of first instance and the Appellate Court, at which the federal questions sought to be reviewed were raised; the manner or method of raising them, and the way in which they were passed on by the court; such pertinent quotation of specific portions of the record of summary thereof with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on the Writ of Certiorari.

It should be noted initially that the petition for a writ of certiorari is procedurally defective in that petitioners have failed to include any of the information required by Rule 21.1(h) of the Rules of the Supreme Court of the United States as set forth above. There is no mention by the petitioners as to where in the proceedings, both at the trial level and in the Appellate Division, at which the federal questions sought to be reviewed were raised, the method or manner in raising them and the way in which they were passed upon the courts. Additionally, the petitioner's statement of the case fails to include any pertinent quotations of specific portions of the record which make specific reference to the places in the record where the matter appears, as will show that the federal question was timely and properly raised.

Notwithstanding this procedural defect, a canvassing of the record below does, in fact, reveal that there was a brief reference to a violation of petitioner's procedural due process rights which was included in a one paragraph discussion on the subject in the brief which was filed on the petitioner's behalf to the Appellate Division of the Superior Court of the State of New Jersey. However, nowhere in the opinion of the Appellate Division of the Superior Court of New Jersey is any federal question mentioned; let alone expressly passed upon (Petition for Writ of Certiorari at 3(a)-5(a))[1]

Thus, the issue before this court is the adequacy of the manner and presentation in which the federal question was raised below.

It is well settled that the jurisdiction of this court to reexamine a final judgment of the state court can arise only if the record as a whole shows expressly of by implication that a federal claim was adequately presented in the state system. *Webb v. Webb*, 451 U.S. 493, 497 (1981); *New York ex rel. Bryant v. Zimmerman*,

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1. Petitioner's petition for certification to the Supreme Court of New Jersey was denied without opinion.

278 U.S. 63 (1928); *Oxley Stave Company v. Butler County*, 166 U.S. 648 (1897). This court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973); *Moore v. Illinois*, 408 U.S. 786 (1972).

In the *Webb* decision *supra*, this court considered the dismissal of a writ of certiorari for want of jurisdiction based upon the petitioner's inadequate presentation of a federal question in the state court's below. The *Webb* decision involved a custody dispute resulting in conflicting results of the states court of Florida and Georgia. *Id.* at 395. The mother's petition for writ of certiorari raised a federal question under the full faith and credit clause of Art. IV, Sec. I of the United States Constitution. *Id.* This court initially noted that nowhere in the opinion of the Georgia Supreme Court was there any mention of the federal question, nor was any federal issue discussed in the dissenting opinion of that court acknowledging that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts unless the aggrieved party in this court can affirmatively show the contrary." *Citing Street v. New York*, 394 U.S. 576, 582 (1969); *see also, Fuller v. Oregon*, 417 U.S. 40, 50, n.11 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). The petitioner in the *Webb* decision rebutted the Court's assumption pointing to the fact that she did use the phrase "full faith and credit" on several occasions in the proceedings below. *Webb, supra*, at 396.

Additionally, this Court took note of the fact that the petitioner did not claim anywhere in her petition for a rehearing before the Georgia Supreme Court that the court's failure to reach the federal claim was error. *Id.* at 397, 398. Ultimately the *Webb* Court was not persuaded that petitioner had made an adequate presentation of her federal claim in the state courts below and

accordingly, petitioner's writ was dismissed for want of jurisdiction. *Id.* at 400. The Court's reasoning emphasized significant policy considerations underlying the statutory requirement that the federal challenge be adequately presented first in the state courts. Among these considerations was the Court's acknowledgement of principles of comity in our federal system.

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty which includes responding to attacks on state authority based on the federal law, or if the litigation is wholly private, construing and applying the applicable federal requirements.

Id. at 500.

Aside from principles of comity, the Court further acknowledged that there are practical reasons for insisting that federal issues be presented first in the state court system. These would include "the opportunity for the parties to develop the record below on the issue, the identification of independent state grounds that might pretermit the federal issue, and the adjudication of the federal claim in the state tribunal in the first instance which would obviate the need for plenary review in the Supreme Court of the United States." *Id.*

At the very minimum, this Court has cautioned that there should be no doubt from the record that the federal issue was adequately presented and passed upon below.

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the federal constitution was presented in the state courts, and that those courts were

> apprised of the nature or substance of the federal claim at that time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this court.

Id. at 502.

In the present case, aside from the procedural omissions in the petition for writ of certiorari as discussed *supra*, petitioners have only made the briefest reference to their constitutional claim in a one paragraph discussion embodied in the brief which was submitted to the Appellate Division of the Superior Court of the State of New Jersey. As in the *Webb* decision, nowhere in the opinion of the Appellate Division of the State of New Jersey is there any federal question mentioned, let alone expressly passed upon. Thus, it is to be assumed that this omission on the part of the Appellate Division of the State of New Jersey was due to want of proper presentation by the petitioner in the state courts. *Webb, supra*, at 496. The petitioners have failed to show the contrary.

It is also significant to note that petitioners never raised the federal question on petition for certification Supreme Court of the State of New Jersey, nor did petitioners claim in their petition for certiorari that either the Appellate Division or the New Jersey Supreme Court's failure to reach the federal claim was error.

Finally, principles of comity require that the parties be afforded the opportunity to develop the record in the state level necessary for adjudicating the issue in order to allow the state courts to exercise their authority. The record was obviously not

developed sufficiently for the state courts to determine the issue in the first instance. There is obviously no basis for this Court to determine whether or not the state court whose judgment is being reviewed had the opportunity to address the federal question that is now being asserted.

Petitioner's failure to adequately present their federal claims in the state courts below mandate denial of petitioner's writ of certification as this Court is without jurisdiction to hear the federal question.

II.

EVEN IF IT IS DETERMINED THAT THE FEDERAL QUESTION WAS ADEQUATELY PRESENTED BELOW, PETITIONER'S WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE TRIAL RECORD TAKEN AS A WHOLE DOES NOT DEMONSTRATE ANY VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS.

In general, standards of review dictate that this Court is to ignore harmless errors that do not affect the essential fairness of the trial. *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). It is the duty of the reviewing court to consider the trial record as a whole and to ignore harmless errors including most constitutional violations. *United States v. Lane*, 474 U.S. 438 (1986).

It is submitted that in the present case, the trial record taken as a whole demonstrates overwhelming credible evidence to support the verdict of the jury. The focus of the petition for certiorari is two-fold: first, the court's charge to the jury, which was never objected to by the petitioner (26T221: 12-23), and sheer speculation with respect to so-called "juror misconduct" (Petitioner's Brief at 46).

A. The Court's Charge Did Not Constitute Plain Error.

Petitioners assert that the trial court erred by failing to include a "loss of chance" charge first enunciated by the New Jersey Supreme Court in *Evers v. Dollinger*, 95 N.J. 399 (1984). In *Evers*, the court held that "the plaintiff should be permitted to demonstrate within a reasonable degree of medical probability that . . . defendant's failure to make an accurate diagnosis and to have rendered proper treatment increased the [plaintiff's] risk of [injury] . . . and that such increased risk was a substantial factor in producing the condition from which plaintiff currently suffers." *Id.* at 417. Thus, the plaintiff must establish that the defendant had a duty "to try and save the plaintiff and that there was a substantial possibility that defendant's actions would save the plaintiff . . . " *Hake v. Manchester Township*, 98 N.J. 302, 311 (1985).

In the present case, petitioners assert that the negligent acts of commission and omission on behalf of the respondent doctors deprived Mrs. O'Grady of her chance to escape from "intercranial emergency" (Petitioner's Brief at 31).

The New Jersey Supreme Court has recognized that in the absence of evidence that a jury was substantially misled or seriously diverted from their careful consideration of the evidence presented, that a failure to include an *Evers* charge of increased risk of harm, justifying "the lost chance of survival" modification of traditional proximate cause causation does not constitute plain error. *Gaido v. Weiser*, 115 N.J. 310, 315 (1989).

The *Gaido* decision involved a medical malpractice action against a psychiatrist for the suicide of plaintiff's husband one day before his appointment with the psychiatrist. Plaintiff alleged that the defendant's refusal to see the decedent prior to his scheduled appoint was negligence causing her husband's death.

The defendant alleged that even if he was negligent, his conduct was not the proximate cause of decedent's death. *Id.* at 311-312. The Court charged the jury employing a standard proximate cause charge. The plaintiff never requested, nor did the Court consider a "lost change exception." The jury returned a verdict that the defendant was negligent, but that his negligence was not the proximate cause of the decedent's death. *Id.* 312.

On appeal, the dissenting judge found that the factual scenario of the case fell within the *Evers* theory of increased risk of harm, thereby justifying a "lost change of survival" charge.

On appeal to the Supreme Court, this case was affirmed. The concurring opinion recognized that while a proper charge on proximate cause would have incorporated the *Evers* doctrine, that it was not clear that "substantial justice" had not been done as a result of the erroneous action. *Id.* 314-315.

> In this case none of the parties perceived the issues as implicating the increased risk-of-harm doctrine . . . , the plaintiff did not ask for such a charge and did not object to the jury charge based on traditional definitions of proximate causation and, understandably, in the circumstances, the trial court did not, on its own, define proximate cause in terms suggested by *Evers*. These are strong indications that the presentation of the case to the jury was not considered by those closest to the litigation to be misleading.
>
> Moreover, it does not appear that the jury was substantially mislead or seriously diverted from a careful consideration of the critical evidence and the ultimate issues. It had a full presentation of the evidence that was further explained and amplified by counsel's summations.

Id.

Thus, the Supreme Court of New Jersey failed to conclude that the error by the trial court constituted plain error requiring reversal. *Id.* at 316.

In the present case, as in *Gaido*, it is significant that the trial court never considered charging the jury on the definition of proximate cause using the *Evers* standard and petitioners never asked for this type of charge. It is also significant that petitioners did not object to the jury charge based on traditional definitions of proximate cause and the trial court did not, on its own, define proximate cause in terms suggested by *Evers*. Specifically, the court stated:

> Now you have just heard me use the term proximate cause. By proximate cause it means that the negligence of the defendant in this case, either or both doctors, was an efficient cause of the condition. That is, a cause which necessarily set the other causes in motion and was a substantial factor in bringing the condition about. And you have to make that finding as to whether or not this condition, what happened on March 31, is a failure of the doctors. If you find there is a deviation, whether or not that brought about the condition, it would have been prevented, is one of the facts.

(26T198: 10-25).

Here, the jury was asked to consider the negligence of the defendant physicians in terms of their failure to provide adequate medical care, and further, that such negligence need be found in the event that it was a substantial factor in bringing the condition about.

Additionally, the jury heard the testimony of three experts on behalf of petitioners who fully articulated their opinions with respect to the negligence and proximate cause, which was further explained and amplified by counsel's summation. The failure of petitioners to request an *Evers* charge indicates that petitioners did not consider the court's charge to be in any way misleading or confusing. Thus, it cannot be concluded that the jury's ultimate determination constitutes an unjust result under the circumstances sufficient to satisfy the strict standard of the plain error rule, nor can it be said that the jury was substantially misled in this regard. *See* New Jersey Court Rule R. 1:7-2; and R. 2:10-2.

It is also significant to note that in this case the jury returned a verdict of no negligence in favor of both respondent physicians without ever having to reach the issue of proximate cause under its traditional definition. Thus, the petitioner cannot be heard to complain that the failure to incorporate the *Evers* charge resulted in jury mistake.

Next, petitioner takes the position that the trial court erred in its submission of a standard negligence charge as to Dr. DiLallo's negligence (Petitioner's Brief at 32-35). To begin with, the question of vicarious responsibility or *respondeat superior* was not even a part of the case below. This resulted from petitioner's voluntary dismissal of Dr. DiLallo's office employees, Phyllis LaFlamme, R.N., Mary C. Major and Mary Ann Hamburger *prior* to the trial in this matter. The sole issue which was before the court was limited to whether or not Dr. DiLallo had any duty to follow up on the letter which he received from Dr. Oberhand, assuming that he saw the letter. This was the primary focus of petitioner's inquiry to each of the expert witnesses at the time of trial. Petitioner's expert Charles C. Duncan, M.D. was questioned as follows:

> Q. With that background, if Dr. DiLallo had gotten a letter described as this letter describes severe disabling headaches, the location of the headaches, and the fact that it was something that Dr. Oberhand was able to clearly identify as being outside his area of specialty, what would have been the standard of practice for Dr. DiLallo to have followed when he got the letter?

(20T63: 4-10).

The inquiry of petitioner's expert Roger Miles Rose, M.D. was as follows:

> Q. That this letter, assuming for a second that he would have read it, when the letter indicates that the headache for which this patient is being referred to him for are severe, that they are disabling, that they are outside of the specialty of the physician who is sending the case in, what was the standard of practice that he would have been required to follow upon receipt of that letter?

(20T147: 14-20).

Finally, the following question was posed to petitioner's expert Bennett M. Derby, M.D.:

> Q. When Dr. DiLallo got that letter, we know that he didn't read it, we know it was placed in the file by somebody within his office, what would have been the standard of practice controlling his conduct with receipt of that letter and the information contained in there?

(19T196: 25; 19T197: 1-5).

In response, petitioners elicited from each expert that the appropriate standard of care for Dr. DiLallo would have been to refer the patient for appropriate evaluation had he read Dr. Oberhand's letter (19T197: 6-13; 20T63: 11-17; 20T149: 14-24).

Each defense expert testified that there was nothing urgent or emergent in the substance of the letter of March 14, 1983, and that had a call been made to the patient, there was no requirement under the circumstances to follow up with that patient if she no longer complained of headaches (25T183: 7-20; 26T40: 1-10).

Thus, the criticism which was directed against Dr. DiLallo had to do with whether or not he had an affirmative duty to act upon the contents of the letter assuming that the letter was seen. This question of "duty" is at the heart of a negligence charge in a medical malpractice context. *See Schueler v. Strelinger*, 43 N.J. 330 (1964); *Carbone v. Warburton*, 22 N.J. Super. 5 (App. Div. 1952), *aff'd*, 11 N.J. 418 (1953). Under the circumstances of the facts of this case and the testimony as it was elicited at trial, it was appropriate and warranted for the court to give a standard negligence charge (26T191-8 to 191-9), and to propound a jury interrogatory as to Dr. DiLallo's negligence (26T200-19, 21).

Once again, petitioner did not object to the propriety of the charge as directed to Dr. DiLallo at the time of trial, nor would it have been appropriate for the court to enter a directed verdict as to Dr. DiLallo's vicarious responsibility for the actions of his employees since the employees were not parties at the time of trial. Thus, the court's charge adequately addressed the questions raised by the evidence and did not constitute plain error.

B. It Is Sheer Conjecture for Petitioners to Suggest That the Verdict Was Based on Extraneous Evidence, Confusion and/or Juror Misconduct.

It is sheer conjecture for petitioners to argue that the jury erroneously relied upon extraneous information not in evidence in order to reach its verdict. In this regard, petitioners speculate "that the jury concluded (without evidence) that Mrs. O'Grady's headache was intermittent and then further concluded (without evidence) that intermittent headache and prodromal bleeding are mutually inconsistent" (Petitioner's Brief at 45). Petitioners base this statement on the supposition that an incorrect passage of Dr. Oberhand's deposition transcript was read back to the jury during deliberations (Petitioner's Brief at 42).

Petitioners seemingly dismiss the jury's consideration of all other available evidence presented, *see* Point C, *infra*, aside from the reading of Dr. Oberhand's deposition testimony in arriving at the verdict. With respect to the passage which was selected to be read back to the jury, there was more than ample opportunity for petitioners to object to this passage. No objection was made by petitioner's counsel on either March 26, 1987 or March 27, 1987 when the passage was reread to refresh the jury's recollection (26T243-248; 27T3-4).

Petitioners seemingly misconstrue the careful and deliberate consideration of the evidence by the jury as "clear and convincing circumstantial evidence of juror misconduct" (Petitioner's Brief at 416) by virtue of the fact that the jury asked for testimony to be reread. In New Jersey, our courts have clearly acknowledged and permitted jury requests for the rereading of testimony. *See State v. Lamb*, 134 N.J. Super. 575, 582 (App. Div. 1975), *aff'd*, 71 N.J. 545 (1976). In the *Lamb* decision, the court noted that " . . . generally where the testimony is readily available and in

the absence of some unusual circumstance, such a request should be granted." *Id.* at 582.

Ultimately, a jury's verdict is presumptively valid and the mere possibility of error is not enough to warrant a new trial. Appellate review of the trial court's actions is governed by New Jersey Court Rule 2:10-1 which provides in pertinent part that a trial court's ruling shall not be reversed unless "it clearly appears that there was a miscarriage of justice under the law." It is submitted that the entire record taken as a whole substantiated the jury's verdict. *Lamedola v. Mizell*, 115 N.J. Super. 514, 527 (Law Div. 1971).

C. Consideration of the Trial Record as a Whole Substantiates the Jury's Verdict in Favor of Dr. DiLallo and Did Not Result in Denial of Petitioner's Due Process Rights.

As set forth in the Counter-Statement of Facts, *supra*, petitioner's medical history was replete with a series of sinus-type headaches and complaints. It was, therefore, reasonable for the jury to conclude that Mrs. O'Grady suffered a spontaneous ruptured aneurysm on March 31, 1983, and that Dr. DiLallo and Dr. Oberhand were not negligent.

The testimony of Dr. Paul Franz in this respect was particularly telling. Dr. Franz was Mrs. O'Grady's chiropractor. He first began treating her in October of 1982 (22T53: 1-2). On the history form that she filled out for his office she indicated that she was a frequent headache-sufferer. Specifically, she advised Dr. Franz that she suffered from headaches approximately two to three times a week for twenty years (24T58: 2-10). He then began treating her between November of 1982 and March of 1983 to correct subluxations found in the lower pelvic area, the dorsal

lumbar junction, the dorsal spine, the upper dorsal spine and the upper cervical spine and the neck (24T70: 1-9).

In January of 1983, she advised Dr. Franz that she was experiencing headaches again (24T73: 3-10). Two months later Mrs. O'Grady returned complaining that she hurt her neck during exercises. Dr. Franz examined Mrs. O'Grady and found subluxation compressions present from the cervical spine. She was complaining of neck pain at that time (24T74: 10-22). X-rays taken of her cervical spine revealed a degenerative joint disease. His clinical examination also indicated a spinal disorder (24T76: 15-25). Mrs. O'Grady was next seen on March 11, 1983. She was still complaining of some discomfort in her neck (24T78: 15-22). She then saw Dr. Franz four days later at which time she was once again complaining of headaches. Following this examination, he found the presence of a subluxation of the cervical spine which accounted for the complaints of pain which she was experiencing. Specifically, he found that she had an upper cervical subluxation of the occipital area which was at the top of the neck or base of the skull (24T80: 2-13). He performed a chiropractic manipulation on that day as well as on March 16, 1983. Her next visit was March 21, 1983. At that time she indicated that her headaches were gone (24T81: 22-25).

It was not a mere coincidence that Mrs. O'Grady's headaches receded following March 16, 1983. It was, in fact, the chiropractic manipulations which were providing her with relief. So-called sentinel or pilot bleeds surely do not respond to chiropractic manipulations. The jury was free to accept Dr. Franz' testimony as to the explanation of when Mrs. O'Grady's headaches improved. Our courts in New Jersey have consistently acknowledged that a jury may adopt so much of a witness' testimony as appears sound and reject all of it or adopt all of it. *Amaru v. Stratton*, 209 N.J. Super. 1, 20 (App. Div. 1985).

Petitioner's expert witness, Dr. Derby, testified that a pilot or sentinel bleed occurs in only fifty percent of the cases of ruptured aneurysms (19T181: 10-13). Dr. Duncan, another expert for petitioner, also agreed that there was a possible basis to attribute petitioner's headaches to her sinus problems (20T105: 13-21). Thus, the jury was presented with a very exacting and extremely plausible explanation for petitioner's symptoms between March 7, 1983 and March 14, 1983. Mrs. O'Grady was a chronic sinus headache sufferer who also happened to sustain a neck injury on March 2, 1983 which caused the pain which radiated to her forehead. Mrs. O'Grady's neck injury responded to chiropractic manipulations and her headache complaints were resolved by March 16, 1983.

With respect to Dr. DiLallo's conduct, even assuming that Dr. DiLallo would have called Mrs. O'Grady if he had seen Dr. Oberhand's letter of March 14, 1983, both defense experts, Drs. Medinets and Jacobson, testified that generally accepted standards of medical practice did not require him to make such a call (25T184: 15-24; 26T38: 9-19). Even Dr. Rose, one of petitioner's liability experts, stated unequivocally, that the letter in issue did not have any sense of urgency to it (20T169; 13-16), and that in an overwhelming number of cases, people who complain of headache pain radiating from the back to the front or from the front to the back, are not necessarily suffering a subarachnoid hemorrhage (20T178: 5-12). It was within the exclusive province of the jury to conclude that there would have been no deviation from accepted of medical practice had Dr. DiLallo read the letter and decided not to act upon it.

Perhaps more importantly, each defense expert testified that had a call been made to the petitioner, there would have been no requirement of the part of Dr. DiLallo to follow up with her if she had no complaints of headaches.

Dr. Franz testified that petitioner's headaches had completely abated following March 16, 1983 (24T81: 22-25). Assuming that Dr. Oberhand's letter was not received by Dr. DiLallo until March 17, 1983 or March 18, 1983, it was certainly reasonable for the jury to conclude that had he called her at that time, she would have advised him that her headaches were gone.

As both Drs. Medinets and Jacobson testified, there would have been no deviation from accepted standards of medical care and practice by Dr. DiLallo in not advising petitioner to come to his office for further evaluation or examination if she had no complaints of headaches or advised him that her headaches were gone (25T186: 7-20; 26T40: 1-10). Thus, there would have been no requirement for Dr. DiLallo to send Mrs. O'Grady for a CAT scan under the circumstances (25T187: 2-12; 26T41: 20-22).

Thus, it is clear that there was overwhelming evidence from which a jury could find no negligence on the part of Dr. DiLallo. Rather, Mrs. O'Grady was the unfortunate victim of a spontaneous ruptured aneurysm for which there was no warning. It is axiomatic that an unfortunate result does not necessarily bespeak professional negligence. *See Schueler, supra; Germann v. Matriss*, 55 N.J. 193 (1970). The jury in this case agreed. Its judgment should be given considerable respect without speculation as to the course of deliberations within the jury room. New Jersey Rule of Evidence Rule 41 specifically prohibits the admission of an inquiry challenging a verdict based on the effect of various events upon the mental processes of jurors. *Id.*

In this case the jury's determination was supported by ample if not overwhelming evidence in the record, and there is no basis for a determination that petitioners were denied due process of law. Accordingly, the petition for certiorari must be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for certiorari be denied.

Respectfully submitted,

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